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SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted]
117

HATTIE RAY KING and JAMES ALBERT KING,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HUGH L. BAILEY,
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Attorney for Petitioners.

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IN THE
SUPREME COURT OF THE UNITED STATES

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HATTIE RAY KING and JAMES ALBERT KING,
Petitioners,

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully show:

I. SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioners were convicted for violation of Section 5604 (a) (1), Title 26, United States Code (possession of tax-unpaid whiskey) in the United States District Court for the Northern District of Mississippi, Delta Division. Judgment and Commitment was dated March 29, 1963

(R. 149, 150). They appealed to the United States Court of Appeals for the Fifth Circuit contending that they were denied a fair trial for the reason that the trial judge, in effect, directed the jury to return a guilty verdict.

The U. S. Court of Appeals, Fifth Circuit, by opinion dated January 29, 1964 (R. 164) affirmed the conviction. Petitioners sought a re-hearing which was denied by order of the Appeals Court dated March 3, 1964 (R. 173).

On application by Petitioners, the mandate was stayed by Court of Appeals order for a period of thirty (30) days from March 3, 1964.

Petitioners respectfully pray for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit, rendered in this cause on January 29, 1964.

II. STATEMENT AS TO JURISDICTION.

Jurisdiction of the Supreme Court of the United States is invoked under Section 1254 of Title 28 of the United States Code. The date of the judgment sought to be reviewed by certiorari is January 29, 1964 and the date of this application for certiorari is March 31, 1964.

III. QUESTION PRESENTED.

The question herein presented is whether Petitioners were denied their right to a fair and impartial trial due to conduct of the trial judge in his remarks to the jury

which Petitioners contend amounted to a directed verdict of guilty.

IV. REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

Petitioners respectfully contend that the comments of the trial judge to the jury, considered in their entirety, amounted to a directed verdict of guilty for the prosecution. Petitioners assert that said remarks were prejudicial and are grounds for reversal in that they resulted in the conviction of Petitioners thereby affecting their substantial rights and that the U. S. Court of Appeals erred in affirming Petitioners' conviction.

Petitioners concede that the judge's remarks were not properly objected to but Petitioners should not be deprived of their liberty due to the inability of counsel to react properly in such a situation; and, further, that said remarks constitute error sufficiently plain and prejudicial to permit review under Rule 52 (b), Federal Rules of Criminal Procedure.

The trial judge, whether intentionally or not, assumed the role of prosecutor when he told the jury that the testimony of the government witnesses is "quite strong" and that the testimony of the defendants "is awfully weak" (R. 119-20); and the U. S. Court of Appeals for the Fifth Circuit, in upholding said practice, held contrary to the decisions of other courts of appeal involving this same question. *Boatwright v. United States*, 105 F. (2d) 737 (judge must not become an advocate). *Wil-*

liams v. United States, 93 F. (2d) 685 (judge, as here, assumed role of prosecutor). *United States v. Carmel*, 267 F. (2d) 354 (CA 7th, 1959). The rule that, "If a trial court sees fit on the one hand to comment in detail on the evidence introduced by the prosecution, he must, on the other hand, comment in detail with reference to the evidence introduced in behalf of the defense" was violated. *Stoneking v. United States*, 232 F. (2d) 385, cert. den. 352 U.S. 835, 77 S. Ct. 54.

Because of the conflict which exists in the decisions of the Courts of Appeal on this question, and due to the deprivation of Petitioners' right to a fair and impartial trial, the decision of the Court of Appeals for the Fifth Circuit involves an important question of federal trial procedure in criminal cases which has not been, but should be, settled by this Court.

Wherefore, your Petitioners pray, that a Writ of Certiorari issue under seal of this Court, directed to the Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of said Court be reversed and for such further relief as to this Court may seem proper.

Dated this 31st day of March, 1964.

HUGH L. BAILEY,
Attorney for Petitioners.

CERTIFICATE OF SERVICE.

I, Hugh L. Bailey, hereby certify that I have this day mailed, United States Mail, postage prepaid a true and correct copy of the foregoing Petition to Hon. H. M. Ray, United States Attorney, Oxford, Mississippi.

Witness my signature this the .....day of ....., 1964.

HUGH L. BAILEY.

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HATTIE RAY KING AND JAMES ALBERT KING,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HUGH L. BAILEY,
Attorney for Petitioners.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20466.

HATTIE RAY KING and JAMES ALBERT KING,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

(January 29, 1964.)

Before TUTTLE, Chief Judge, and HUTCHESON and GEWIN, Circuit Judges.

PER CURIAM: After careful consideration, we conclude that there is no substance in the grounds asserted for this appeal. Counsel took no exceptions to the charge of the court, thus failing to preserve any claim of error arising from the charge. We think it is plain that there is no basis for the contention here made that the trial court's comments on the evidence constituted substantial error against appellants.

The judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20466.

HATTIE RAY KING and JAMES ALBERT KING,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

(March 3, 1964.)

ON PETITION FOR REHEARING.

Before TUTTLE, Chief Judge, and HUTCHESON and GEWIN, Circuit Judges.

PER CURIAM: It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20466.

D. C. Docket No. R-6313.

HATTIE RAY KING and JAMES ALBERT KING,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

Before TUTTLE, Chief Judge, and HUTCHESON and GEWIN, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 29, 1964

Issued as Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1148

HATTIE RAY KING and JAMES ALBERT KING,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on January 29, 1964, its opinion being reported at 327 F. 2d 495. A petition for rehearing was denied on March 3, 1964. Mr. Justice Black extended the time within which to file a petition for certiorari to and including April 15, 1964. A typed copy of the petition was served on the United States Attorney

on April 3, 1964, and service was refused by him. The Department of Justice was served with a printed copy on April 14, 1964, but the petition and record were not filed with the Clerk of this Court, as required by Rule 22, until May 22. The petition is therefore out of time under Rule 22-2 of the Rules of this Court.

In any event, the petition raises no issue warranting review by this Court. Petitioner's sole contention is that there was plain error in the trial court's comments on the evidence in its charge to the jury. After reviewing the evidence, the court said (R. 120):

> To summarize what I have said, the Government's case, from these three witnesses, if you believe what they have said, is quite strong. And according to my view, the testimony offered by the defendants is awfully weak. If you believe the testimony of the Witness Mashburn beyond a reasonable doubt, then it is your sworn duty to find these two defendants guilty as charged. On the other hand, if you believe the testimony of the two remaining witnesses whose testimony you are permitted to consider in arriving at your verdict for the defendants, the two defendants themselves, if you believe what they have had to say about it, or if from their testimony there remains a reasonable doubt as I have defined reasonable doubt to you, then you should vote not guilty for your verdict. Let me caution you again, now, you are in no way bound by what comment I have given you on the evidence. I have a right to make that comment under the law of the United States. You are not bound by

> it. You are perfectly free to disregard it entirely when you retire to the jury room to consider your verdict.

Similar admonitions carefully limiting the effect of the court's comment on the evidence were repeatedly made during the course of the charge (R. 112, 118, 119, 122). No exception to the charge was made by either party (R. 123).

The remarks of the court were amply justified by the record. The local area supervisor of the alcohol and tobacco tax division of the Internal Revenue Service testified that about 9:00 p.m. on August 13, 1962, he observed a pickup truck stop on a dead-end road in Tallahatchie County, Mississippi. The only houses on the road were those of petitioner and his father. A man and a woman emerged from the cab of the truck and two children alighted from its back end. The man then unloaded a number of jugs from the truck by passing them to the woman and children, who hid them in bushes by the side of the road (R. 24-27). Then they all returned to the truck, which started down the road. The supervisor, who had observed the truck continuously, then radioed instructions to two investigators to close in on the truck and arrest its occupants. He saw that nobody left or entered the truck in the meantime (R. 27, 29). The two investigators testified that they drove up and found petitioners standing near the truck which was then parked in another field road. Three one-gallon jugs, which were found to contain non-tax-paid whiskey, were directly at their feet and an ad-

ditional seven jugs were found in the bushes nearby (R. 49-50, 65-67). More jugs with similar contents were found in the bushes where the truck had first stopped (R. 49, 68). When he was arrested, petitioner James King asked that his wife be allowed to go home because "she's got nothing to do with this whiskey" (R. 29, 53).

Both petitioners testified in their own behalf. They denied possession of any whiskey and claimed that they had been looking for a bull which had been bought that day and which had broken out of its fenced-in lot (R. 81-86, 99-101). The jury found petitioners guilty on a one-count indictment for possessing non-taxpaid whiskey after deliberating for nine minutes (R. 141). Petitioner James King was sentenced to two years' imprisonment, and petitioner Hattie King was fined $500 and placed on probation for three years (R. 148-151).

In the circumstances shown, the guarded comment by the court was wholly proper. Manifestly, no question of plain error which would warrant reversal under Rule 52(b) of the Federal Rules of Criminal Procedure is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JUNE 1964

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